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No. 83-529

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The arguments raised in the brief of amicus curiae in support of the judgments below were anticipated and answered in our opening brief and do not require further response. We do believe, however, that the Court may wish to consider the question of the effect, if any, of respondents' fugitive status on the proper disposition of this case, and we therefore address that question herein.

The government's petition for a writ of certiorari in this case was filed on September 27, 1983, and was granted on June 18, 1984. On May 11, 1984, while the petition was pending, counsel for respondents advised the Clerk of this Court by letter that respondent Sharpe had become a fugitive with respect to charges pending in the Northern District of Georgia and the State of North Carolina (Motion to Proceed In Forma Pauperis 1 & Exh. A). Thereafter, on July 11, 1984, the United States District Court for the District of South Carolina entered orders forfeiting the

bonds of both respondents due to their failure to appear before the court for a bond hearing on July 10, 1984 (Motion to Proceed In Forma Pauperis 1 & Exh. B). As of this writing, we are advised by the United States Attorney's office that, to the best of its knowledge, respondents remain fugitives.[1]

At the outset, we note that respondents' fugitive status does not affect this Court's Article III jurisdiction to decide this case. The government, which has sought review of the court of appeals' decision reversing respondents' convictions, clearly has a "live" interest in the outcome of the case. Reversal of the decision below would reinstate the judgments of conviction and sentences entered by the district court and would subject respondents to imprisonment on their convictions. For this reason, respondents, wherever they may be, also retain a legally cognizable interest in the outcome of the case. See *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 1-3 n.2; *Powell* v. *McCormack*, 395 U.S. 486, 496-497 (1969). Indeed, in *Molinaro* v *New Jersey*, 396 U.S. 365, 366 (1970), the Court, while declining to adjudicate an appeal brought by a criminal defendant who had become a fugitive, expressly stated that the defendant's "escape does not strip the case of its character as an adjudicable case or controversy."

The question remains, however, whether respondents' fugitive status should, as a matter of sound judicial discretion, affect the manner in which the Court disposes of this case. As we see it, there are basically three options. First, the

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[1]Our opening brief in this case was filed August 6, 1984. While we were aware at that time that respondent Sharpe had become a fugitive, we did not learn of respondent Savage's fugitive status until advised by letter of August 23, 1984, from opposing counsel. For that reason, the *Molinaro* issue was not addressed in our opening brief.

Court could proceed to decision on the merits of the issues presented, entirely ignoring the fact that respondents are fugitives and are unavailable to suffer the consequences of any judgment adverse to their interests that the Court may render. Second, the Court could vacate the judgment of the court of appeals in respondents' favor and remand for the purpose of dismissing respondents' appeals, without reviewing the merits of the issues on which the government's petition was granted. Finally, the Court could proceed with review on the merits, reversing the judgment of the court of appeals if it is in error and vacating the judgment if it is not. We believe the first option is incompatible with the sound principles underlying the *Molinaro* doctrine and should be rejected. While both the second and third approaches have something to commend them, for the reasons we set forth below we submit that the balance of public interests favors the third course.

In *Molinaro*, the Court dismissed the appeal on the ground that the appellant had become a fugitive. The Court explained (396 U.S. at 366):

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. * * * [S]uch an escape * * * disentitles the defendant to call upon the resources of the Court for determination of his claims.

See also *Eisler* v. *United States*, 338 U.S. 189 (1949); *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *Smith* v. *United States*, 94 U.S. 97 (1876). Of course, this case may be distinguished from *Molinaro* because here the party seeking review in this Court is the government, not the escaped defendants. Consideration of the policies that inform *Molinaro* demonstrates, however, that this distinction does not

support a difference with respect to the escaped defendants' loss of entitlement to a ruling by this Court in their favor.

To begin with, although it is true that the case came to this Court on the government's petition for certiorari, it was respondents' appeal of their convictions that set in motion the chain of events that led the government to petition for review of the court of appeals' decision. If respondents had become fugitives during the pendency of their appeals in the court below, there is no question that, under *Molinaro*, the court could and presumably would have exercised its discretion to decline to adjudicate their claims. See *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975); *United States* v. *Shelton*, 508 F.2d 797, 799 (5th Cir.), cert. denied, 423 U.S. 828 (1975) (collecting cases). Respondents should be in no better position merely because they postponed their flight until after the government sought review of the court of appeals' decision in their favor.

Indeed, the rationale for dismissal of an appeal when the appellant is at large is equally applicable to respondents' situation. As the Court explained in *Smith* v. *United States*, 94 U.S. at 97:

> It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case.

See *Estelle* v. *Dorrough*, 420 U.S. at 543-544 (Stewart, J., dissenting); *Dawkins* v. *Mitchell*, 437 F.2d 646, 647 (D.C. Cir. 1970).

The guiding principle — equally applicable without regard to the identity of the party that has initiated the proceedings in this Court — is whether the defendant is prepared to submit to the jurisdiction of the courts in the event of an unfavorable disposition of his case. This principle should apply with special force when the issue to be adjudicated does not touch upon the question of the defendant's guilt or innocence, but concerns whether reliable evidence of guilt should be suppressed in order to further the deterrent policies of the exclusionary rule, of which the defendant is an incidental beneficiary. This Court determined in *United States* v. *Havens*, 446 U.S. 620 (1980), and *Walder* v. *United States*, 347 U.S. 62 (1954), that the interest in maintaining the integrity of judicial proceedings against false testimony outweighed the remote and speculative possibility that the use of illegally seized evidence for impeachment would impair the deterrent efficacy of the exclusionary rule. So here, the refusal to allow fugitive criminal defendants to secure relief from a conviction, even if based on illegally seized evidence, protects the integrity of the judicial process with even less conceivable impact on official compliance with the Fourth Amendment.[2] We accordingly urge the Court to hold that respondents in this case have forfeited any right to benefit from the judgment below, even if that judgment is legally correct, by virtue of their flight from justice.

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[2]Manifestly, no officer would be encouraged to undertake a contemplated unlawful search or seizure by the possibility that the fruits thereof might be used if the defendant becomes a fugitive during the pendency of appellate proceedings.

The question remains whether the Court should simply vacate the judgment of the court of appeals and remand with directions to dismiss the appeal[3] or should decide the merits of the substantive Fourth Amendment issues before turning to the question of remedy (which would not arise if this Court were to reverse as to both respondents). If a defendant becomes a fugitive while an appeal of a district court's suppression order is pending before a court of appeals, we believe the proper course would be to vacate the suppression order without passing upon the merits of the appeal. But additional interests must be weighed in the balance once this Court has granted review. When the government seeks review, its interests encompass more than the correction of what it believes to be an erroneous disposition of the particular case. The decision to petition for certiorari also reflects, in most instances, a determination that authoritative disposition of the legal questions decided by the court of appeals is important to the development and administration of the law and to the conduct of the government's operations. And, of course, the action of this Court in granting plenary review upon the government's petition tends to reflect its concurrence in the conclusion that the issues presented call for authoritative disposition.

Accordingly, we submit that the appropriate course would be for the Court to proceed to decide the questions presented. If the Court were to disagree with the decision of the court of appeals, it should reverse the judgment of that court. If, on the other hand, the Court were to agree with the

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[3]If this Court were to vacate the judgment of the court of appeals without deciding the substantive issues on which it may grant review, we believe it should not be open to the court of appeals thereafter to reinstate its judgment in the event respondents are subsequently apprehended or surrender themselves. Such a course would enable respondents to profit from their flight and would prejudice the rights of the government.

lower court's decision, it should not affirm the judgment below. Instead, it should vacate the judgment of the court of appeals and remand the case to that court with directions to dismiss the appeals with prejudice.

The course we propose, which this Court is empowered by 28 U.S.C. 2106 to adopt, would not require the Court to render an advisory opinion. As demonstrated above, the case itself presents a live controversy, which Article III empowers this Court to adjudicate. Moreover, as the Court observed in *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 25, "courts have considerable discretion in conforming their decision-making processes to the exigencies of particular cases." Here, the Court should reach the merits because "resolution of [the] Fourth Amendment question is necessary to guide future action by law enforcement officers" (*ibid.*). At the same time, however, respondents, who have removed themselves from the custody and control of the courts, are not entitled to any favorable relief from this Court, regardless of its ruling on the merits.

Respectfully submitted.

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NOVEMBER 1984

DOJ-1984-11